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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1361~~ 99

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL
Petitioners,

v.

REDERIAKTIEBOLAGET TRANSATLANTIC
Respondent.

RESPONDENTS' REPLY TO MEMORANDUM OF AMICI CURIAE

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RESPONDENTS' REPLY TO MEMORANDUM OF AMICI CURIAE

The memorandum of the Justice Department and the Maritime Commission as amici curiae, supporting the certiorari petition, should be rejected, or if not rejected, denied.

(a) *Rejection.*

The memorandum was filed after the briefing process on the pending application had been completed (March 29, 1970) and was served on respondents on April 2, 1970, after the deadline for answering the petition (April 1) had

passed. Apart from the infirmity of lateness, the Government's procedure represents an illicit effort to reverse a case from which the Federal Maritime Commission had advisedly held aloof in the District Court and the Court of Appeals. As shown by the annexed affidavit (Exhibit A), the Commission turned its back on the proceedings below after full inquiry into the matters at issue and after dispatching two attorneys to audit the District Court's prehearing conference as official observers. The Government now claims the right to begin the litigating process in this court after purposefully standing clear of the contest at every previous stage. Its procedure constitutes an abuse of this Court's appellate function.

(b) *Denial.*

The Government's request for a writ of certiorari should, if not rejected, be denied because the Government (i) misstates the principal question (collateral attack) cited as justifying review, and (ii) wrongly attributes error to the Court below by misdescribing the Commission action which the Court reversed.

(i) *The misstated question:* Question No. 1 in the Government memorandum is:

> 1. Whether the Federal Maritime Commission's determination of the validity of a conference tariff amendment, on reference from a district court entertaining private litigation, may be attacked collaterally in the district court action rather than in accordance with the exclusive direct review procedures provided by the Administrative Orders Review Act.

The statement of the question treats the decision below as upholding the right of courts to entertain collateral attacks on the rulings of administrative agencies. The Court of Appeals made no such decision, holding only that an agency ruling "did not bind non-parties," and emphasizing that it was "not concerned with the parties to the proceeding."

The following paragraph comprises the Court's entire discussion of the question (Petition, App. B, Offset Opinion, p. 6):

> We need consider only one other matter, the question of the binding effect of the *Boston Shipping* decision even though erroneous. We are not concerned with the parties to the proceeding, as they did not join in the present appeal. Nor is the question whether the decision was an appropriate approval—to the extent that it was an approval—of demurrage charges incurred after its date. We must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto. *See Columbia Broadcasting System, Inc. v. United States,* 1942, 316 U.S. 407, 418; Davis, 2 Administrative Law Treatise § 18.05. Any other conclusion would destroy the statutory requirement.

The quoted passage shows that the Court took care to refrain (and did refrain) from deciding what the Government insists was decided.

The matter of collateral attack is thus reduced to the question whether the respondent (Transatlantic) was a party to the Commission proceedings in the special circumstances of this case—hardly an issue of Supreme Court dimensions.[1]

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[1]The District Court admitted Transatlantic to intervention on a petition citing the inadequacy of representation by Transatlantic's Boston agent (App. Vol. I, 12-13). Contrary to the Government's assertion (Memorandum, 10), Transatlantic did not assert "that it was represented in the administrative proceedings through its agent." The Government cites its note 3 (Memorandum, 5) in support of this statement, but the note quotes only a Transatlantic averment that it was represented "in Boston" by such agent—not in the Commission case. The Government statement not only stretches the record but tenders a quibble too trivial for this Court. Had the Government wished to contest Transatlantic's intervention, it could have done so by intervening in the District Court instead of going home after the prehearing conference.

Since the Court below did not expose the normal run of administrative rulings to collateral attack, its decision conflicts with no decisions which safeguard such rulings from such attack. For the same reason, the finality of the Commission's order for purposes of direct appeal is not a question open on this record.

(ii) *The substantive decision.*

The Government claims (Memorandum, 11 ff) that an industry-wide shift of terminal charges from cargo interests to ocean carriers was within the terms of an inter-terminal agreement which the Commission had approved, and that the Court below was wrong in ruling otherwise. If the Government's argument is available at this late date, we contest it on the following grounds:

1. It is at odds with this Court's decision in *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261. The Government claims (Memorandum, 13) that a shift in the "incidence" of a charge from one group to another is a "conventional tariff change" which needs no approval. *VW* holds the opposite. The Government sees significance in the detail that in *VW*, no prior agreement had been filed whereas here *an* agreement had been filed and approved. We see no relevance in this unless the approved agreement covered the acts performed under its asserted cover. Collective price allocation not covered by an approved agreement is indistinguishable from similar action not covered by any agreement.

2. The Commission was wrong and the Court below was right as to the scope of the approved agreement, for reasons set forth in the opinion below and at pages 2-3 of respondents' brief in opposition to the pending petition for certiorari. The Commission, in its decision covering 19 pages in the printed Appendix (Vol. I, 60-79), nowhere quoted the language it was interpreting, nor does the Government do so in its present memorandum. The Government asserts (Memorandum, 13) "a broad leeway" for Com-

mission interpretation of agreements. The cases cited for the assertion do not sustain it. They merely concede that the Commission enjoys "reasonable" interpretative leeway, *Swift & Co. v. Federal Maritime Commission*, 306 F.2d 277, 281 (C.A.D.C., 1962); or that its interpretations are entitled to "due deference," *Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 375 F.2d 335, 339 (C.A.D.C., 1967); or "weight," *North Atlantic Westbound Freight Ass'n. v. Federal Maritime Commission*, 397 F.2d 683, 685 (C.A.D.C., 1968). No case suggests that the Commission can claim infallibility even when construing unrevealed language. Moreover, every case cited for the "broad leeway" doctrine involved a Commission finding that actions other than normal rate increases or decreases were *not* sanctioned by the agreements and approvals cited to justify them. The Government now claims that these same cases establish a doctrine of complete permissiveness: as long as some agreement has been approved, it can be stretched to cover any form of concerted action by the parties no matter what its provisions may be. The sponsorship of this doctrine by any Government officer and most particularly by the chief of the Antitrust Division is a major puzzlement.

3. The Commission's right to receive normal tariff changes –the type which raise or lower the rates on beans or automobiles–without requiring amendment of the agreements which authorize them, has not been impaired by the Court below. Its footnote No. 3, suggesting that *VW* superseded *Empire State Highway Transp. Assn., Inc. v. Federal Maritime Commission*, 291 F.2d 336 (D.C. Cir., 1961), cert. denied, 368 U.S. 931, contained a sufficient caveat, noting that "some changes in rates and charges are now expressly allowable without approval under the 1961 amendment to section 15."

Before the 1961 amendment, § 15 provided that before approval, "it shall be unlawful to carry out" any agreement or modification of an agreement subject to its terms. The

1961 amendment (Pub. L. 87-346) added an exception:

> ". . . except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof . . . agreed upon by approved conferences, and changes and amendments thereto . . . shall be permitted to take effect without prior approval . . ."

This amendment was virtually coextensive with *Empire State*. In citing the amendment (enacted after *Empire State*—on October 3, 1961), the Court below left *Empire State* unblemished.

CONCLUSION

The Government has no right to stand clear of litigation until it turns out against the Government's wishes and then seek in this Court relief which should have been requested of the District Court or the Court of Appeals. Further, the questions which the Government professes to discern are not tendered by the decision below, which leaves unchanged the regulatory practices which the Government aims to preserve. The Court below properly applied *VW* and made no other change in the powers or procedures of the Maritime Commission.

Respectfully submitted,

GEORGE F. GALLAND
AMY SCUPI
Attorneys for Respondent

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AFFIDAVIT OF GEORGE F. GALLAND

District of Columbia, ss:

George F. Galland being duly sworn, states:

1. I am one of the attorneys for the respondent (hereafter, Transatlantic). This affidavit is submitted in conjunction with respondent's opposition to the memorandum filed by the United States and the Federal Maritime Commission as amici curiae (hereafter government memorandum).

2. The Federal Maritime Commission has been fully aware of the litigation here involved from a date prior to the prehearing conference before the District Judge (Wyzansky) on April 25, 1969. On April 23, 1969 the Com-

mission's General Counsel (James L. Pimper) and Solicitor (Kenneth H. Burns) telephoned my partner, Mrs. Amy Scupi, to discuss the posture of the case in the District Court, and requested permission to examine our files. Mrs. Scupi summarized the case to Mr. Burns and offered him full access to the files. The next day Norman C. Barnett, Esq., an attorney on Mr. Burn's staff, visited my office and I delivered for his unrestricted inspection our complete files which he examined for about an hour.

3. On April 25, Judge Wyzansky held a prehearing conference in Boston. Mr. Burns and Mr. Barnett both attended such conference as observers for the Commission, and remained in attendance until the conference ended. The issues of fact and law were openly canvassed in their presence and hearing.

4. Judge Wyzansky announced at the prehearing conference that the case would be tried on Monday, April 28. I asked Messrs. Burns and Barnett whether the Commission would send a representative or seek to participate in the trial. Mr. Burns replied that a decision would be made over the weekend.

5. When the case was called on the 28th, no Commission representative was present and the Commission made no move to enter the case in any capacity in either the District Court or the Court of Appeals—or in this Court until the filing of its memorandum as amicus curiae, dated "March 1970". It was received by mail in my office on April 2, 1970, by which date the time for answering the petition for a writ of certiorari had expired.

George F. Galland

Sworn to before me this day of April, 1970.

Notary Public
My commission expires November 30, 1973